IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

CRIMINAL REVISION APPLICATION No 38 of 2002

For Approval and Signature:

HON'BLE MR. JUSTICE M.D. SHAH

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1. Whether Reporters of Local Papers may be allowed to see the judgements? : NO

2. To be referred to the Reporter or not? : NO

3. Whether Their Lordships wish to see the fair copy of the judgement? : NO

4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 of any Order made thereunder? : NO

5. Whether it is to be circulated to the concerned Magistrate/Magistrates,Judge/Judges,Tribunal/Tribunals? : NO

M M BAKARWALA INTELLIGENCE OFFICER

Versus

ALI MOHAMED SUMARA @ ALI SULEMAN KHAFI

Appearance:

1. Criminal Revision Application No. 38 of 2002

MS SEJAL K MANDAVIA for Petitioner.

MR EE SAIYED for Respondent No. 1

MR BM GUPTA for Respondent No. 1

K.P.Raval, A.P.P. for Respondent No. 2

CORAM : HON'BLE MR. JUSTICE M.D. SHAH

Date of decision: 05/04/2005

C.A.V JUDGEMENT

1. The present Criminal Revision Application filed under Section 397 and 401 of the Criminal Procedure Code, 1973 is directed against the judgment and order dated 5th December, 2001 passed by the learned Additional Sessions Judge, City Sessions Court at Ahmedabad below Exh.7 in Sessions Case no.30 of 2001 whereby the discharge application preferred by the respondent no.1 (original accused no.1) under Section 227 of the Cr.P.C. came to be allowed.

2. The facts shorn of unnecessary details that are required for disposal of the present Criminal Revision Application are as follows:

2.1 The respondent no.1 and other eleven co-accused persons entered into criminal conspiracy to obtain Mandrex tablets and dispose them off in India as well as abroad in pursuance of which mandrex tablets weighing 5225.300 Kgs. valued at Rs.5,22,53,000/- were taken from GIDC Bulsar to the Wadi of one Farid Bava Chisti and then to coast of Jafrabad for export, but since the export did not materialize they stored the same in Wadi of accused Harishchandra Kathadbhai Jeballia & Batukbapu at Junagadh and from there while the said tablets were being taken to South Indian Coast for export, the trucks carrying the said tablets were intercepted and the Muddamal Mandrex tablets were secured. It was mainly alleged by the prosecution that the two trucks bearing nos GJ-10/T-8517 and no.GJ-3/U-4022 carrying barrels of Mandrex tablets were managed and controlled by the respondent no.1 and that he had conspired with the co-accused, namely, Jusab Razak Ali Sidi, Dinesh Alabhai Dhruv, Chhagan H.Kuchhadia @ Chhagan Langdo, Haji Suleman Khafi and Gafar Suleman Khafi and his father Haji Seleman Raimal Khafi, who had in their statements recorded under Section 67 of the NDPS Act ,1985 involved the present respondent no.1 as co-conspirator in commission of the offences in question.

3. After necessary investigation, as the accused were apprehended at different times and different complaints were filed, Sessions Case bearing nos.236/1994 ,72 of 1995, 297/95 and 160 of 1996 were launched by the prosecution against different accused, and after the trial a common judgment was delivered on 14-05-1998 by the Additional Sessions Judge, Court no.10, Ahmedabad, whereby ten accused come to be convicted for various offences. Thereafter another accused Harishbhai Kathadbhai Jebalia who was absconding was arrested by Junagadh Police Station and his custody was taken by D.R.I.Department and prosecution was launched against him

vide Sessions Case no.200/200 which is pending. Similarly the respondent no.1-the present accused who was lodged in Nasik Jail in connection with Sessions Case nos.9/200, 292/200 and 1214/200 was also arrested and produced before the Addl.Principal Judge, Court no.2, City Civil and Sessions Court, Ahmedabad , as upon a complaint filed by the Intelligence Officer, D.R.I, Ahmedabad, the present respondent no.1-accused was chargesheeted for the offences punishable under Sections 23 and 29 of the Narcotic Drugs and Psychotropic Substances Act, 1985 which came to be registered as Sessions Case no.30 of 2001. As the abovestated Sessions Case no.200 of 2000 also arose from the same transaction, the same was ordered to be consolidated with Sessions Case no.30 of 2001. However, during the pendency of these Sessions Cases, the present respondent no.1 preferred application Exh.7 for discharge . The learned Additional Sessions Judge, Court no.4, City Sessions Court, Ahmedabad on the basis of the material placed before him came to the conclusion that there was no material as would necessitate framing of the charge against the respondent no.1, and thereby, allowed the application of the respondent no.1-accused, giving rise to the present Criminal Revision Application.

4. Ms. Sejal Mandavia, learned Counsel for the applicant-DRI has strenuously argued that alongwith the complaints documents have been produced at Annexures " A" & " D" and that the statement of co-accused involve the present respondent no.1 as a co-conspirator for the offence and these statements corroborated each other on material particulars. According to Ms. Mandavia there is sufficient material for framing charge against the respondent no.1-accused as the statement of the co-accused is admissible in evidence and the statement of the co-accused can be looked into for the purpose of proving conspiracy.

5. In order to substantiate her say, the learned Counsel has placed reliance on the decision of the Hon'ble Supreme Court in the case of State, through Supdt. of Police CBI/SIT v. NALINI AND OTHERS reported in (1999 5 SCC253, wherein it has been held as under:

"But the contention that any statement of a conspirator, whatever be the extent of time, would gain admissibility under Section 10 if it was made "in reference to" the common intention, is too broad a proposition for acceptance. We cannot overlook that the basic principle which underlies in Section 10 of the Evidence Act is the theory of agency. Every conspirator

is an agent of his associate in carrying out the object of the conspiracy. Section 10 which is an exception to the general rule, while permitting the statement made by one conspirator to be admissible as against another conspirator restricts it to the statement made during the period when the agency subsisted. Once it is shown that a person became snapped out of the conspiracy, any statement made subsequent thereto cannot be used as against the other conspirators." This is not a stage where the Court is required to come to a conclusion as to when a person snapped out of any conspiracy. I find considerable force in the submission made by the learned Counsel as in the case on hand, the fact whether the respondent no.1-accused had entered into a conspiracy or not with the remaining accused can only be ascertained after recording of evidence at the trial. It becomes therefore, necessary that the charge has to be framed so as to enable the trial Court to evaluate the evidence on record. The submission, therefore, merits acceptance.

6. The learned Counsel has next relied on the decision of the Honourable Supreme Court rendered in the case of SUPDT. AND REMEMBERANCER OF LEGAL AFFAIRS, WEST BENGAL V. ANILKUMAR BHUNJA AND OTHERS, reported in AIR 1980 SC 52, wherein it has been held that at the stage of framing charges, the prosecution evidence does not commence. The Magistrate has therefore, to consider the question as to framing of charge on a general consideration of the materials placed before him by the investigating Police Officer. The standard test, proof and judgment which is to be applied finally before finding the accused guilty or otherwise is not exactly to be applied at the stage of Sections 227 and 228. In this context, the learned Counsel has also relied on the decision of the Honourable Supreme Court in the case of STATE OF MAHARASHTRA V. PRIYA SHARAN MAHARAJ AND OTHERS, reported in AIR 1997 SC 2041, wherein at paragraph 8 of the judgment it has been held that at the stage of framing of the charge the Court has to consider the material with a view to find out if there is ground for presuming that the accused has committed the offence or that there is not sufficient ground for proceeding against him and not for the purpose of arriving at the conclusion that it is not likely to lead to a conviction. In the instant case the respondent no.1-accused has managed and controlled the two trucks carrying Mandrex tablets, a psychotropic substance prohibited under NDPS Act, 1985 in an attempt to dispose off the same in India as well as abroad and had also conspired with the other co-accused as can be seen from the statements of the other co-accused who had involved the respondent no.1 in

the commission of the crime in question. It has to be appreciated that question whether the statement made by the co-conspirator is admissible under Section 10 of the Evidence Act is to be adjudicated at the trial and this would depend upon the facts and evidence that would be available during the trial. Thus, when there is sufficient material to proceed against the accused the framing of the charge is necessary. The submission is therefore well founded and requires to be accepted.

7. Apart from this, reference is required to be made to the decision rendered by the Apex Court in the case of OM wati (SMT) AND ANOTHER V. STATE Through Delhi Admn & Others, reported in 2001 SCC (Cri.) 685, wherein at paragraphs 7 and 8 of the judgment it has been held that:

"Now no reasons are required to be recorded when the charges are framed against the accused persons. At the stage of passing the order in terms of Section 227 of the Code, the court has merely to peruse the evidence in order to find out whether or not there is sufficient ground for proceeding against the accused. If upon consideration the Court is satisfied that a prima facie case is made out against the accused, the Judge must proceed to frame charge in terms of Section 228 of the Code. Only in a case where it is shown that the evidence which the prosecution proposes to adduce to prove the guilt of the accused, even if fully accepted before it is challenged in cross-examination or rebutted by defence evidence cannot show that the accused committed the crime, then and then alone the court can discharge the accused. The Court is not required to enter into meticulous consideration of evidence and material placed before it at this stage."

7.1 Reference may also be had to the decision rendered by the Honourable Supreme Court in the case of Umar Abdul Sakur Sorathia v. Intelligence Officer, Narcotic Control Bureau reported in 1999 Cri.L.J. 3972 wherein in the facts of that case at paragraph 3 of the judgment in view of conspiracy with the co-accused whose statement was recorded under Sec.67 of the NDPS Act, it was held at para 18 that there is no scope for contending that the Court cannot frame charge under Sec.29 read with Section 23 of the NDPS Act.

8. As against that Mr.B.M.Gupta, learned Counsel for the respondent no.1-accused has submitted that there is no evidence worth the name produced by the prosecution alongwith the charge-sheet which connects the present respondent no.1 in the commission of the crime and that

the witnesses named in the charge-sheet have not made any statement involving the present respondent no.1 accused. According to the learned Counsel for the respondent no.1 except the statement of the co-accused, there is no other material or evidence which would even remotely point out an accusing finger at the respondent no.1 or involve him with the commission of the crime in question. According to him, looking to Section 25 of the Evidence Act, the statement of co-accused is not admissible in evidence, and therefore, learned Additional Sessions Judge has rightly passed the order below Exh.7 in Sessions Case no.30 of 2001 allowing the discharge application filed by the respondent no.1. The learned Counsel for the respondent no.1 has further argued that the statement of co-accused cannot be treated as evidence under the law. He also submitted that the learned Sessions Judge after recording necessary evidence had convicted the other ten co-accused taking into consideration all the legal aspects and knowing fully well that the other co-accused had been convicted, the learned Judge had allowed the discharge application of the respondent no.1. He finally argued that revision power cannot be exercised as an appellate power and that in exercise of revisional power the High Court cannot undertake in-depth and minute re-examination of the entire evidence.

9. In support of his submissions, the learned Counsel for the respondent no.1 has placed reliance on the observations made by the Honourable the Supreme Court in the case of HARDEEP SINGH SOHAL ETC.v. STATE OF PUNJAB through CBI reported in 2004 (7) Supreme 461, as also, the decision rendered by the Kerala High Court in the case of G.JAYAKUMAR V. SUPERINTENDENT, CENTRAL EXCISE AND OTHERS reported in 1999 (1) EFR 296. However, I am of the opinion that the ratio of these decisions stand on an entirely different footing as in the case before the Supreme Court there was full fledge recording of evidence and the judgment was delivered by the trial Court which was challenged before the High Court and the Supreme Court, more so, in Hardeep Singh's case Supra, the Supreme Court was dealing with a case under the Terrorists & Disruptive Activities (Prevention) Act, 1987. Reliance placed by the learned Counsel for the respondent no.1 on these decisions do not merit acceptance.

10. The learned Counsel for the respondent no.1 has next placed reliance on the judgment rendered by the learned Single Judge of this Court (Coram:C.K.Buch,J.) in the case of NANUBHAI VASTABHAI KATARIA v. STATE OF GUJARAT reported in 2000 (2) G.L.H.97. In that case, the

facts are entirely different and the elements of abetment on account of "illegal omission" was missing on the papers of police investigation, and therefore, there was prima facie evidence on record for discharge, while in the instant case, the statements of other co-accused involve the respondent no.1 in the commission of the crime and their statements corroborate each other. The ratio of this decision, cannot be of any help to the learned Counsel for the respondent no.1.

11. The learned Counsel for the respondent no.1 has next placed reliance on the decision rendered by the Honourable Supreme Court in the case of STATE OF KARNATAKKA Vv. L.MUNNASWAMY AND OTHERS, reported in A.I.R. 1977 SC 1489. In that case, the Honourable Supreme Court has arrived at a finding that allowing the proceedings to continue would be an abuse of the process of the Court. The question whether the material on the record if unrebutted is such on the basis of which a conviction can be said reasonably to be possible has also been determined and it has been held therein that there is no material on the record on the basis of which any tribunal could reasonable come to the conclusion that the accused therein was, in any manner, connected with the incident leading to the prosecution, and thus there was no material on record for framing of the charge. That is not so in the present case. Here, there is a strong suspicion and that too at the stage of framing of the charge that the respondent no.1-accused has conspired with the other co-accused in the commission of the crime and the respondent no.1 had in fact managed and controlled the two trucks used in transporting the Mandrex tables as referred to above, more particularly, when the statements of the co-accused have involved the respondent no.1 in the commission of the crime and their statements corroborate with each other.

12. The learned Counsel for the respondent no.1 has next relied on the decision rendered by the Honourable Supreme Court in the case of STATE OF U.P.THROUGH CENTRAL BUREAU OF INVESTIGATION V. DR. SANJAY SINGH AND ANOTHER, reported in 1994 (Supp (2) SCC 707. In that case before the Supreme Court, there was only mere suspicion without action or role played by the accused, whereas in the instant case, the statements of the co-accused having involved the respondent no.1 in the commission of the crime and their statements are found to corroborate each other and the respondent no.1 is said to have managed and controlled the trucks carrying Mandrex tablets, and therefore, there is strong suspicion coupled with action showing that the accused is connected with

the commission of the crime in question. Thus, so far as the instant case is concerned, the co-accused has connected the present applicant as conspirator in committing the crime in question, and hence, Section 10 of the Evidence Act would come into play. In that view of the matter, the authority cited by the learned Counsel for the respondent no.1, cannot be made applicable to the facts of the present case.

13. Lastly, the learned Counsel for the respondent no.1 has placed reliance on the judgment rendered by the the learned Single Judge of this Court (Coram: A.N.Divecha,J., as His Lordship then was), in the case of RAMABEN W/O.AMRATDAYALJI PATEL to contend that the revisional jurisdiction does not ordinarily confer powers on the revisional Court to reparreciate the evidence on record unless a strong case is made out to the effect that the findings recorded in the judgment and order under challenge are perverse. Reappreciation of evidence cannot be resorted to in exercise of powers simply because the revisional Court thinks that the view taken by the lower Court is erroneous. Findings of fact are not permitted to be disturbed in exercise of revisional powers unless such findings are shown to be perverse. I am in respectful agreement with the proposition laid down in this decision, but in the instant case, there is prima facie evidence involving the respondent no.1 in the commission of the crime as referred to hereinabove. I am of the view that the Judge while considering the question of framing the charges under Section 227 of the Code has the undoubted power to shift and weigh the evidence for the limited purpose of finding out whether or not a prima facie case against the accused has been made out and when the materials place before the Court disclose grave suspicion against the accused which has not been properly explained the Court will be fully justified in framing a charge and proceeding with the trial. The authority cited by learned Counsel for the respondent no.1 would, therefore, be of no help to him.

14. Reverting to the facts of the present case in the light of the ratio of the aforesaid decisions, we find that it has come out in the evidence that the respondent no.1 took an active part in commission of the crime in question as the respondent no.1 had managed and controlled the two trucks carrying Mandrex tablets in an attempt to sell the same in India as well as abroad and had also conspired with the other co-accused and therefore, a strong suspicion can be gathered that the respondent no.1-accused had entered into a criminal conspiracy with the other accused. Now the aspect

whether the present accused had entered into a criminal conspiracy can only be ascertained at the trial which necessitates the framing of the charge. I am, therefore, of the opinion that, in the present case, there is sufficient material on record which would indicate that the framing of the charge against the respondent no.1 is essential.

15. Having given my anxious thought and consideration to facts of the case, the evidence on record and the submissions urged at the Bar by the rival sides, I am constrained to hold that the learned Judge, Ahmedabad, was not justified in allowing the no.1-accused.

16. As a result of the foregoing discussion, this Criminal Revision Application succeeds and is allowed. The impugned order dated 5th December, 2001 passed below Exh.7 in Sessions Case no.300 of 2001 by the learned Additional Sessions Judge, Court no.4, City Sessions Court, Ahmedabad, is hereby quashed and set aside. Rule is made absolute.

16.1 Since the accused is in jail since long, it is directed that the trial Court shall hear and decide the Sessions Case no.30 of 2001 as expeditiously as possible, without being influenced by any observations made in this order.

(M.D.Sah,J.)

stanley-mds.